



Tax Laws Amendment (Retirement Villages) Bill 2004

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Tax Laws Amendment (Retirement Villages) Bill 2004

Date Introduced: 18 November 2004

House: House of Representatives

Portfolio: Treasury

Commencement: The Bill takes effect when it receives Royal Assent. However, the measures in **Schedule 1** in relation to serviced apartments take effect from 1 July 2000. The commencement of other measures is dealt with in the Main Provisions section of the Bills Digest.

Purpose

The aim of the Bill is to clarify how the GST applies to retirement villages. The [Explanatory Memorandum](#)¹ states the purposes of the measures in Schedule 1 of the Bill are as follows:

Schedule 1 to this bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that supplies of certain services and accommodation to residents of serviced apartments in retirement villages are GST-free where the resident requires ‘daily living activities assistance’ or ‘nursing services’.

... ..

Schedule 1 to this bill also amends the GST Act to ensure that supplies of accommodation, accommodation related services and meals by a charitable operator of a retirement village to a resident of that retirement village are GST-free

Background

What are retirement villages?

Retirement villages have been an accommodation option in Australia since the 1950s when a number of church organisations first set them up. Later, both private and community organisations also began establishing retirement villages. Retirement villages cater for people aged over 55 years of age but they vary as to the type of accommodation and support services they provide. Some villages only provide self-care accommodation whilst others provide a continuum of care from self-care to serviced accommodation to low care (hostel level) or high care (nursing home) accommodation. These latter two categories are classified as residential aged care and eligible owners/operators providing these facilities are directly subsidised by the Commonwealth. It is the first two categories

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of accommodation (self care units and serviced units) that are the main concern of this Bill.

Residents in self care units tend to provide much of what they need (for example, food, personal care) for themselves but also use and share some village facilities such as recreation rooms. They may also avail themselves of some maintenance and other village support services. They are essentially self supporting. Residents in serviced units typically, either eat in communal dining rooms or have their meals delivered. They are often also provided with some nursing services as well as cleaning and maintenance support and assistance. Often there is a blurring of the distinction between these two types of retirement village accommodation with residents being self supporting in some things but requiring assistance with others.

The lack of clarity that has occurred with respect to how the GST applies to retirement villages is essentially because of a narrow definition by the Australian Taxation Office of the words 'residential setting' as used in the GST Act.

The GST and Retirement Villages

GST Legislation

Section 38-25 of the GST Act sets out the conditions when a supply of residential care services is GST-free. The provisions relevant to retirement villages and serviced apartments for aged persons are in subsection 38-25(3) set out below.

- 3) A supply of services is *GST-free* if:
- (a) the services are provided to one or more aged or disabled people in a residential setting; and
 - (b) the *Aged Care Minister has determined in writing that the services are of a kind covered by Schedule 1 to the *Quality of Care Principles; and
 - (c) the services include, and are only provided to people who require, the services set out in:
 - (i) item 2.1 (daily living activities assistance) of Part 2 of that Schedule; or
 - (ii) item 3.8 (nursing services) of Part 3 of that Schedule.

Australian Taxation Office Interpretation of the GST Act

An insight into how the ATO has interpreted subsection 38-25(c) of the GST Act can be obtained from its [Interpretative Decision ATO ID 2001/664](#) made on 30 November 2001. The issue before the Commissioner was whether a retirement village was eligible for GST-free supply under section 38-25 of the GST Act when it supplies meals to residents in independent living units. The relevant part of that Interpretative Decision is set out below.

For subsection 38-25(3) of the GST Act to apply, the supply of residential care must satisfy the following criteria:

- the care recipient is aged or disabled and receiving the care services in a residential setting; and

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- the services provided to the care recipient satisfy the Aged Care Minister's Determination under paragraph 38-25(3)(b) of the GST Act; and
- the services include, and are only provided to people who require the services set out in item 2.1 or item 3.8 of Schedule 1 to the Quality of Care Principles.

Meaning of 'residential setting' in the ATO's view

The expression 'residential setting' is not defined in the GST Act. However, the Interpretative Decision seeks to equate the meaning of 'residential setting' with an inferred meaning of 'residential facility' in the *Aged Care Act 1997*.

The justification for this interpretation as set out in the Interpretative Decision is set out below:

The term 'residential setting' is not defined in the GST Act. However, Acts in *pari materia* can be consulted in interpreting the Act in question. An Act in *pari materia* is an Act which deals with the same subject matter as the Act being interpreted (*Danziger v. The Hydro-Electric Commission* [1961] Tas SR 20).

Section 38-25 of the GST Act refers to principles made under the Aged Care Act 1997. Therefore, it is permissible to consult the Aged Care Act 1997, as an Act in *pari materia*, to determine the meaning of the term 'residential setting'. In the context of residential care, 'residential setting' has a similar meaning to 'residential facility' in the Aged Care Act 1997.

A 'residential facility' in the Aged Care Act 1997 is a facility that provides accommodation that includes:

- appropriate staffing to meet the nursing and personal care needs of the person; and
- meals and cleaning services; and
- furnishing, furniture and equipment for the provision of that care and accommodation.

The Aged Care Act 1997 provides that residential care does not include care provided to a person in their private home. It follows that the terms 'residential facility', and therefore 'residential setting', do not include a private residence.

This means that where a person lives in an independent living unit that can be regarded as their own home, it will not come within the ambit of these terms. This applies whether the unit is owned or leased, and whether or not the unit is in a specific complex or in the community at large.

In this context, 'residential setting' equates with the type of facility provided in the publicly funded residential care sector, for example nursing homes.

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This narrow definition as outlined by the Australian Taxation Office created a ‘grey’ area in that it appeared to restrict the GST free areas applying to retirement villages in contradiction to the intent of the original GST legislation. For example, the [Explanatory Statement to the GST-free Supply \(Residential Care - Non-Government-Funded Supplier\) Determination 2000](#) would appear to support the view that aged people living in privately funded residential accommodation, including serviced apartments in retirement villages, may expect to receive the GST-free treatment of services that are GST-free in Commonwealth funded aged care services.

The intent of the primary legislation is for aged or disabled people in like care situations, who are living in privately funded residential accommodation, to be treated similarly in terms of their access to GST-free services, as aged or disabled people living in Commonwealth funded residential aged care services under the *Aged Care Act 1997*.

Main Provisions

Clarification of the meaning of residential setting in the GST Act

The Bill clarifies the meaning of ‘residential setting’ by the amendments proposed in **items 2 and 3 of Schedule 1**.

Item 2 inserts **proposed subsections 38-25(3A), (3B), and (3C)**.

Proposed subsection 38-25(3A) states that services provided to a resident of a retirement village are taken for the purposes of section 38-25(3) to be provided in a residential setting, if and only if:

- (a) he or she is a resident of a serviced apartment in the retirement village; and
- (b) there is in force a written agreement under which the operator of the retirement village provides daily meals and heavy laundry services to all of the residents of the apartment.

However, **proposed section 38-25(3B)** limits the category of persons in serviced apartments who may have otherwise by the operation of **proposed section 38-25(3A)** been deemed to be in a residential setting for the purposes of section 38-25(3) to persons:

- who will come within a determination in writing of the Aged Care Minister as to the levels of care required, and
- who are assessed by the Aged Care Secretary as requiring the levels of care set out in the determination.

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According to the Explanatory Memorandum, the determination of the Aged Care Minister will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Proposed section 38-25(3C) states that a determination under **proposed section 38-25(3B)** may be restricted to a specific class of residents of serviced apartments in retirement villages. The [Explanatory Memorandum](#)² adds:

This would allow the Aged Care Minister to only require that any assessment process apply to new entrants to serviced apartments, with existing residents qualifying under the existing test in the law. This flexibility exists to avoid significant backlogs occurring if an assessment process were introduced that is significantly different from current arrangements.

Thus it is the Government's intention that existing residents of serviced apartments should not be disadvantaged by the new assessment rules.

Definitions added to the Dictionary within section 195-1 of the GST Act

The Dictionary in section 195-1 of the GST Act will be amended to include additional definitions with the following meanings.

Aged Care Secretary

The 'Aged Care Secretary' means the Secretary of the Department that administers the *Aged Care Act 1997*. (**Schedule 1, item 9**)

Retirement Village

Premises satisfy the definition of 'retirement village' if:

- the premises are 'residential premises' (as currently defined in the Dictionary);
- accommodation in the premises is intended for people who are at least 55 years old or older; and
- the premises include communal facilities for use by the residents of the premises.

However, premises will not be a 'retirement village' if:

- they are used, or intended to be used, for the provision of residential care (within the meaning of the *Aged Care Act 1997*) by an approved provider as defined in that Act; or
- they are 'commercial residential premises' (as currently defined in the Dictionary).

(**Schedule 1, item 11**)

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Serviced Apartment

A 'serviced apartment' is an apartment that is designed to be occupied by aged residents who require either or both of the following:

- item 2.1 (daily living activities assistance) of Part 2 of Schedule 1 of the *Quality of Care Principles*; and
- item 3.8 (nursing services) of Part 3 of Schedule 1 of the *Quality of Care Principles*.

(Schedule 1, item 12)

Charitable retirement villages

The Bill provides GST-free tax treatment for particular supplies made by charitable institutions or trustees of charitable funds that operate retirement villages (Schedule 1, item 5, proposed paragraph 38-260(a)).

However, it is necessary that the charitable retirement village operator make the supply to a resident of a retirement village operated by the charity. Accordingly, supplies made by the charitable retirement village to visitors or staff of the retirement village would not qualify for GST-free treatment. (Schedule 1, item 5, proposed paragraph 38-260(b)).

The range of supplies to which GST-free treatment applies, includes the supply of accommodation in a charitable retirement village, services related to the supply of the accommodation and meals. (Schedule 1, item 5, proposed paragraph 38-260(c)).

Application

- The amendments made by **Schedule 1** to the Bill concerning serviced apartments will apply to net amounts for tax periods starting on or after 1 July 2000. (Schedule 1, subitem 14(1))
- The amendments in relation to charitable retirement villages will apply to supplies made on or after the day on which the bill receives Royal Assent (Schedule 1, subitem 14(3)).
- The Explanatory Memorandum adds that existing arrangements entered into by charities are protected by the current view of the GST law published by the Australian Taxation Office, to the extent they have relied on that view³.
- A determination made for the purposes of **proposed paragraph 38-25(3B)(a)** of the GST Act does not apply in relation to any supplies made before Royal Assent. (Schedule 1, subitem 14(2)).

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Concluding Comments

The effect of these measures is that that residents in serviced apartments in retirement villages who receive daily living or nursing assistance will receive these supplies GST free. Under the Bill, the degree and extent of daily living and nursing assistance that is required to enable the resident to be exempt from the GST is to be made by a Determination of the Aged Care Minister.

As the amendments in respect of serviced apartments apply from 1 July 2000 (when the GST took effect) some operators will be able to claim refunds for overpaid GST as provided in the Bill.

The Bill also specifically provides that supplies of accommodation, accommodation services and meals are GST free in charitable retirement villages. This provision confirms what is current practice with respect to how the GST applies to charitable retirement villages. However, the amendments in this Bill in relation to charities do not allow staff and visitors in retirement villages to benefit from the GST exemption.

Financial impact

The [Explanatory Memorandum](#)⁴ states that the cost of the measures in the Bill is as follows.

2004-2005	2005-2006	2006-2007	2007-2008
\$47 million	\$11 million	\$12 million	\$13 million

The high cost in the first year reflects the expected claims for refunds of GST paid from 1 July 2000 in respect of serviced apartments.

Endnotes

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- 1 [Explanatory Memorandum](#) to the Tax Laws Amendment (Retirement Villages) Bill 2004; p. 3.
 - 2 *ibid.*, p. 9, paragraph 1.17.
 - 3 *ibid.*, p. 17, paragraph 1.55.
 - 4 *ibid.*, p. 3.

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